Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

STEVEN T. WAUGH,

Petitioner,

v.

THOMAS A. HORTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "forum defendant rule," a civil action commenced in state court that meets the requirements of federal diversity jurisdiction may be removed to federal district court if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). The question presented is:

Whether the Eighth Circuit was correct to hold, in conflict with other circuits, that a violation of the "forum defendant rule" of 28 U.S.C. § 1441(b) is a jurisdictional defect requiring remand, rather than a defect "other than lack of subject matter jurisdiction" that is waived if not raised in a timely motion to remand the case.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the Eighth Circuit were Petitioner Steven T. Waugh, who is a defendant in the court below; Thomas A. Horton, who is the plaintiff in the court below; and Respondents Katherine A. Conklin, Norman S. Redhead, Stephen W. Templar, Church of the Holy Cross Episcopal, National Epileptic Foundation, St. Philips Episcopal Church and Outreach, Alison Horton Waldrip, Caring Friends of Denver, Lee Graber, Sylvia Graber, and Steven Asay, defendants in the court below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. The Decision Of The Eighth Circuit Conflicts With Decisions Of Seven Other Circuits. 9

A. The Overwhelming Majority Of Circuits Hold That The Forum Defendant Rule Is Not Jurisdictional. 10

B. The Eighth Circuit Stands Alone In Holding That A Violation The Forum Defendant Rule Defeats Federal Jurisdiction Over Cases Removed From State Court 14

II. The Forum Defendant Rule Is Not A Requirement Of Federal Jurisdiction 16

III. The Eighth Circuit's Decision That The Forum Defendant Rule Is Jurisdictional Was Dispositive Of The Case 18

IV. The Question Presented Will Not Benefit From Further Consideration In The Courts Of Appeals 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Page(s)

American Fire & Casualty Co. v. *Finn*, 341 U.S. 6 (1951) 17
Bailey v. *Texas Co.*, 47 F.2d 153 (2d Cir. 1931) 13
Beneficial Nat'l Bank v. *Anderson*, 539 U.S. 1 (2003) 3
Breuer v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) 3
Farm Construction Services, Inc. v. *Fudge*, 831 F.2d 18 (1st Cir. 1987) 12
Grubbs v. *General Elec. Credit Corp.*, 05 U.S. 699 (1972) 12, 15
Handley-Mack Co. v. *Godchaux Sugar Co.*, 2 F.2d 435 (6th Cir. 1924) 13
Hurley v. *Motor Coach Indus., Inc.*, 222 F.3d 377 (7th Cir. 2000) 9, 10
Hurt v. *Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992) 8, 14, 15, 18
In re Allstate Ins. Co., 8 F.3d 219 (5th Cir. 1993) 19
In re Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991) 11, 12
Korea Exchange Bank v. *Trackwise Sales Corp.*, 66 F.3d 46 (3d Cir. 1995) 9, 10, 11, 16
Lincoln Prop. Co. v. *Roche*, 126 S. Ct. 606 (2005) 3, 4
Loftis v. *UPS*, 342 F.3d 509 (6th Cir. 2003) 18, 19
Mackay v. *Uinta Dev. Co.*, 229 U.S. 173 (1913) 16
Nolan v. *Prime Tanning Co.*, 871 F.2d 76 (8th Cir. 1989) 18
Payne v. *Brake*, 439 F.3d 198 (4th Cir. 2006) 18
Rivet v. *Regions Bank*, 522 U.S. 470 (1998) 3

Snapper, Inc. v. *Redan*,
171 F.3d 1249 (11th Cir. 1999) 13, 14, 17
Syngenta Crop Prot., Inc. v. *Henson*,
537 U.S. 28 (2002) 3
Things Remembered, Inc. v. *Petrarca*,
516 U.S. 124 (1995) 4, 7
United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) 20
Velchez v. *Carnival Corp.*,
331 F.3d 1207 (11th Cir. 2003) 19
Wisconsin Dep't of Corr. v. *Schacht*,
524 U.S. 381 (1998) 3
Woodward v. *Overmyer Co.*,
428 F.2d 880 (2d Cir. 1970) 12, 13

STATUTES

28 U.S.C. § 1332 2
28 U.S.C. § 1441 ..... 1, 3, 16
28 U.S.C. § 1447 ..... 1, 2, 4, 8, 19

OTHER

James William Moore,
Moore's Federal Practice 3d (2006) 9, 16, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, in conflict with other federal courts of appeals, held that that a violation of the "forum defendant rule" of 28 U.S.C. § 1441(b) is a jurisdictional defect requiring remand. Each of the seven other circuits that has decided the question has held that the "forum defendant rule" is nonjurisdictional, and thus may be waived if the adverse party fails to file a timely motion for remand under 28 U.S.C. § 1447(c). Certiorari should be granted to resolve the persistent split in the circuits on this important jurisdictional question.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 431 F.3d 602. The district court's order, App., *infra*, 9a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2005. App., *infra*, 1a. A petition for rehearing en banc was denied on February 9, 2006. App., *infra*, 8a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1441(b) of title 28 provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be

> removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b).

Section 1332 of title 28 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> * * *

28 U.S.C. § 1332.

Section 1447 of title 28 provides, in pertinent part:

> Procedure after removal generally
>
> * * *
>
> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.
>
> * * *
>
> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed

pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447.

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided. The "forum defendant rule" of 28 U.S.C. 1441(b) provides that no defendant in a non-federal question case removed from state court may be a resident of the state in which the action was brought. The circuits have split over whether the forum defendant rule is a jurisdictional requirement of removal or a non-jurisdictional requirement that may be waived by the adverse party.[1]

1. The "Forum Defendant Rule." Section 1441 of title 28 sets forth the general rule for removal to a federal court of cases originally brought in a state court: "[A]ny civil action brought in a State court" may be removed if "the district courts of the United States have original jurisdiction" over the case. 28 U.S.C. § 1441(a). Cases based on a federal question are "removable without regard to the citizenship or residence of the parties." *Id.* § 1441(b). All other cases are removable "only if none of the parties in interest properly joined and served as

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[1] The Court regularly grants petitions for certiorari to resolve conflicts among the circuits over the scope of federal removal jurisdiction. *E.g.*, *Lincoln Prop. Co.* v. *Roche*, 126 S. Ct. 606, 612 (2005); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6 (2003); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003); *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 31 (2002); *Wis. Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 385 (1998); *Rivet* v. *Regions Bank*, 522 U.S. 470, 474 (1998).

defendants is a citizen of the State in which such action is brought." *Id.*

This Court recently noted that "several lower courts have held that the presence of a diverse but in-state defendant in a removed action is a 'procedural' defect, not a 'jurisdictional' bar, and that the defect is waived if not timely raised by the plaintiff." *Lincoln Prop. Co.* v. *Roche*, 126 S. Ct. 606, 613 n.6 (2005).

2. Remand To State Court And Appellate Review. After a case is removed to federal court, a remand to the state court is appropriate in two circumstances. First, the case must be remanded "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). Second, a case may be remanded "on the basis of any defect other than lack of subject matter jurisdiction," but a motion to remand for a reason other than lack of subject matter jurisdiction "must be made within 30 days after the filing of the notice of removal." *Id.*

Section 1447(d) of title 28 provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." This Court has held that this provision must "be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review." *Things Remembered, Inc.* v. *Petrarca*, , 127 (1995). A district court's remand order thus is reviewable on appeal unless it is "based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction." *Id.*

In this case, Respondent did not move to remand the case to state court. Consequently, the remand order was proper and unreviewable only if a violation of the forum defendant rule is a requirement of federal subject-matter jurisdiction, rather than a nonjurisdictional defect.

3. Factual Background. Petitioner Steven Waugh was named as a beneficiary of a trust created by his mother and stepfather, Peggy and Stephen Horton, on February 28, 1997. As originally drafted, the trust became irrevocable upon death of one of the trustors. The trustors made several handwritten changes to the trust document between 1997 and 2003, but did not modify the irrevocability provisions. After the trust was executed, Petitioner's mother was diagnosed with Alzheimer's Disease. On June 2, 2003, the trustors executed an amendment that removed restrictions that the trust had imposed on the surviving spouse. The June 2, 2003 amendment also listed the Hemlock Society, an entity that advocates assisted suicide, as an organization that the surviving spouse should consider in distributing the assets of the trust. Petitioner's mother died one day after executing the amendment, and was cremated one day after she died.

A little more than one year later, Petitioner's stepfather, Stephen Horton, the surviving trustor, prepared a final "Letter of Instruction." The letter, dated September 15, 2004, designated Respondent, Stephen Horton's cousin, as the trustee and main beneficiary of the trust. The instruction also specified a gift of $20,000 to "Caring Friends of Denver" (another name for the Hemlock Society), and instructed that the gift should be accompanied by a card reading, "Thank You," and including the dates of both trustors' deaths. The final instruction left nothing to Petitioner. Petitioner's stepfather died two days later and was cremated within three days.

4. The District Court's Order. One week after Stephen Horton's death, Respondent brought a petition to construe the trust in Missouri state court. App., *infra*, 2a. The petition asked the court to declare the validity of the final instruction. Respondent named twelve defendants,

including Petitioner, his sister, nine additional parties who had at one time or another been designated as beneficiaries of the trust, and an individual who was a financial advisor to the trustors. *Id.* & n.2. Respondent is a citizen of Maine; all of the defendants were citizens of other states. *Id.* at 2a.[2]

Petitioner filed a timely Notice of Removal based on diversity of citizenship. *Id.* The Notice of Removal was deficient in two respects. First, it was not joined by any of the other defendants. Second, three of the named defendants appeared to be citizens of Missouri, where the original case had been filed. *Id.* Respondent did not, however, move to remand the case to state court because of either deficiency. *Id.* To the contrary, Respondent filed an answer to Petitioner's counterclaim, in which he requested that the court "proceed to adjudication" on the merits.

The possibility of a remand was raised by the district court *sua sponte*. The court issued an order raising the possibility that it "may not have jurisdiction to hear this case." *Id.* The court noted that because three defendants appeared to be citizens of Missouri, the court

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[2] The Eighth Circuit's opinion incorrectly states that the district court "remanded the case to Missouri state courts due to a lack of complete diversity." App. *infra*, 3a. It is undisputed that complete diversity exists between Respondent, a citizen of Maine, and all defendants to the state proceeding, who are citizens of Arizona, California, Colorado, Maryland, Missouri, Texas, Utah, or Washington. In addition, the amount in controversy exceeds the $75,000 jurisdictional requirement of 28 U.S.C. § 1332(a): According to Stephen Horton's final instruction letter, the trust contained assets in excess of $800,000, including $500,000 in life insurance. *See* Mot. of Appellee to Expedite Review (noting $500,000 life insurance policies).

might not have jurisdiction under Eighth Circuit precedent holding that the "forum defendant rule" is jurisdictional in nature. The court directed Respondent to file a brief stating whether any of the Missouri defendants had been served. The court reasoned that "[i]f these defendants [had] been served in the state court proceedings, removal would be improper and [the district court] would not have jurisdiction." App. *infra*, 10a. In response, Respondent filed a brief stating that the Missouri defendants had been served by certified mail, and included copies of the return receipts of those mailings.[3] *Id.* Respondent did not, however, move that the case be remanded to state court.

Petitioner replied to Respondent's brief, arguing that the other defendants had not responded to the original complaint and should be dismissed. The district court denied Petitioner's motion to dismiss and *sua sponte* remanded the case to the Missouri state court because of the violation of the forum defendant rule. *Id.* at 12a.

5. The Eighth Circuit's Decision. The Eighth Circuit held that it lacked jurisdiction to hear Petitioner's appeal of the district court's remand order. App., *infra*, 5a. The court based its decision on Eighth Circuit precedent holding that a violation of the forum defendant rule is jurisdictional. *Id.* at 3a-4a.

The court of appeals first noted that 28 U.S.C. § 1447(d) forbids appellate review only of remand orders "based on grounds specified in § 1447(c)." *Id.* at 4a, quoting *Things Remembered*, 516 U.S. at 127. The court

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[3] Missouri law requires that service of process on in-state parties may be made by mail only if personal service cannot be made. Mo. R. Civ. P. 54.12(b). Here, all of the Missouri defendants were in the same county as Respondent's counsel, and no explanation was offered for the lack of personal service.

therefore concluded that it "lacks jurisdiction to review remand orders that are based on procedural defects brought within thirty days or jurisdictional defects raised at any time before final judgment is entered." *Id.*[4]

Petitioner argued that the presence of a defendant in the forum state constituted a defect other than lack of subject matter jurisdiction, and that Respondent's failure to move for remand constituted a waiver of his right to remand. *Id.* The Eighth Circuit disagreed. The court relied on its prior decision holding that "violation of the forum defendant rule is a jurisdictional defect." *Id.* at 4a, citing *Hurt* v. *Dow Chem. Co.*, 963 F.2d 1142, 1146 (8th Cir. 1992). The court acknowledged that "other circuits have held to the contrary that the violation of the forum defendant rule is a procedural, nonjurisdictional defect," but concluded that "*Hurt* sets forth the better rule." *Id.* at 4a. The court thus held that Petitioner's "violation of the forum defendant rule constituted a jurisdictional defect," and that it consequently lacked jurisdiction to review the district court's order. *Id.* at 4a-5a.

The court of appeals suggested that there were two additional grounds for remanding the case. First, the court noted that Petitioner had violated the "rule of unanimity" by failing to join all defendants in the notice of removal, and stated that this violation "appears to be dispositive." *Id.* at 3a. Second, the court stated that Respondent "demonstrated, per the district court's order,

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[4] In listing the grounds upon which remand is permissible, the court quoted a superseded version of § 1447(c). Section 1447(c) now permits remand based on: (1) a motion to remand "on the basis of any defect other than lack of subject matter jurisdiction" made within 30 days after the filing of the notice of removal; or (2) if "it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447.

that Missouri defendants had been served within the thirty day window [that Respondent] had to file a remand motion." *Id.* at 5a n.3. The court of appeals concluded that "even if this case had been reviewed under the rule that the forum defendant rule is nonjurisdictional, [Petitioner] could not have prevailed, as [Respondent's] compliance with the district court's order arguably obviated the need to file a motion to remand." *Id.*[5]

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Eighth Circuit Conflicts With Decisions Of Seven Other Circuits.

The Eighth Circuit's opinion in this case recognizes the existence of a split in the circuits on whether the forum defendant rule in diversity cases removed from state courts is a jurisdictional requirement or a defect other than subject matter jurisdiction that may be waived. App., *infra*, 4a, 7a. Other courts and scholars have also noted this split. *E.g.*, *Hurley* v. *Motor Coach Indus., Inc.*, 222 F.3d 377, 379 (7th Cir. 2000); *Korea Exch. Bank* v. *Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995); 16 Moore's Federal Practice § 107.14[2][e][ii] ("The courts are split on whether the ban on local defendants is procedural or jurisdictional."). The persistent circuit split on an important issue of federal subject-matter jurisdiction warrants review by this Court.

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[5] The court went on to reject Petitioner's appeal from the district court's denial of his motion to dismiss the other defendants in the case, and to deny Respondent's motion for sanctions. *Id.* at 5a-7a.

A. The Overwhelming Majority Of Circuits Hold That The Forum Defendant Rule Is Not Jurisdictional.

Six circuits have held that the presence of a defendant in the forum state does not preclude federal jurisdiction over a case removed from state court. One additional circuit has stated that its interpretation of § 1447(c) leads to the same conclusion.

In *Hurley* v. *Motor Coach Industries, Inc.*, the Seventh Circuit considered whether a defendant in the forum state precluded federal jurisdiction over a personal injury case removed from state court. 222 F.3d 377 (7th Cir. 2000). In *Hurley*, as here, the state-court plaintiff did not file a motion to remand, even though a defendant was a citizen of the forum state. *Id.* at 378-79. The defendant argued that the plaintiff's failure to move for remand waived any objection to removal. *Id.* at 379. The court noted that "waiver is possible only if the forum defendant rule is nonjurisdictional." *Id.*

The court noted that "[t]he overwhelming weight of authority" favors the position that the forum defendant rule is nonjurisdictional, *id.* (collecting cases), and it concluded that "the majority rule is the correct one." *Id.* The court reasoned that where, as here, "the case as it arrived in federal court met every requirement for federal jurisdiction," but "took the wrong path, in a sense, because there was an in-state defendant," the defect "is more a matter of removal procedure, and hence waivable, than a matter of jurisdiction." *Id.* at 380.

The court also noted that the policy behind the forum defendant rule supports its characterization as nonjurisdictional. "The rule is designed to preserve the plaintiff's choice of a (state) forum, under circumstances where it is arguably less urgent to provide a federal forum to prevent prejudice against an out-of-state party." *Id.*

According to the court, "the only purpose that would be served by declaring the forum defendant rule jurisdictional would be to preserve for plaintiffs rights that the plaintiffs themselves failed to assert." *Id.* The court thus elected to "join the longstanding line of authority that holds that the forum defendant rule is nonjurisdictional." *Id.*

The Third Circuit likewise has held that the presence of a forum defendant is nonjurisdictional and waivable. In *Korea Exchange Bank* v. *Trackwise Sales Corp.*, a New York plaintiff filed a complaint against three New Jersey defendants in New Jersey state court. 66 F.3d 46, 47 (3d Cir. 1993). More than 30 days after the complaint was served on the first defendant, it removed the case to federal court. *Id.* The other two defendants were served after the notice of removal, and did not join in the notice of removal. The district court noted that the defendants were citizens of New Jersey and remanded the case *sua sponte* to state court. *Id.*

The Third Circuit treated the appeal as a writ of mandamus and ordered the district court to vacate its remand order. *Id.* at 51-52. The court held that there was no dispute that "the action was not removable" because of the New Jersey defendants, and proceeded to examine whether this constituted "a 'jurisdictional' defect, which would bar . . . jurisdiction to review, or whether it was a 'procedural' defect," which is reviewable. *Id.* at 48. The Third Circuit examined a series of this Court's cases, in which the Court "consistently refused to treat the removal statute as imposing independent jurisdictional requirements." *Id.* at 49. The court concluded "that section 1441(b)'s bar against removal by a forum-state citizen is not jurisdictional." *Id.* at 50. The court noted that its conclusion "is consistent with the conclusions reached by almost every other court of appeals that has addressed the issue," and that the position "is endorsed by

several leading commentators." *Id.* (collecting authorities).

The Fifth Circuit has also held that a violation of the forum defendant rule did not strip the district court of jurisdiction. *In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991), was originally filed in Texas state court and was timely removed to federal court. *Id.* at 1519. As here, two defendants were residents of the forum state. *Id.* The plaintiffs moved to remand because of the two forum defendants, but their motion was filed more than 30 days after the notice of removal. *Id.* Nevertheless, the district court granted the motion and remanded the case to the Texas court. *Id.* The defendants then petitioned the Fifth Circuit for mandamus to compel the district court to recall its remand order. *Id.*

The appellate court noted that "[a]lthough the defendants were citizens of the forum state, the district court still had subject matter jurisdiction because complete diversity existed." *Id.* at 1519. The court, writing prior to this Court's decision in *Things Remembered*, held that it had jurisdiction because the remand order was based on "a 'defect in removal procedure,'" that was not timely raised, "not on lack of subject matter jurisdiction." *Id.* at 1520-21 & n.4. The court reviewed the legislative history of § 1447 and the scholarly commentary, noting that the authorities were in agreement that the presence of a forum defendant constitutes "non-removability of a proceeding otherwise within federal jurisdiction." *Id.* at 1521-22. The court concluded that because that condition exists at the time of removal, it is a nonjurisdictional "defect in the removal procedure." *Id.* at 1522.

The First Circuit has also adopted the majority rule. In *Farm Construction Services, Inc.* v. *Fudge*, 831 F.2d 18 (1st Cir. 1987), the plaintiff appealed after an adverse judgment, charging that the case should be

remanded because of the presence of a forum-state defendant. The court agreed with the plaintiff that "the initial removal of this action was improper," but held that by failing to object to removal, the plaintiff waived his right to remand. *Id.* at 21-22. The court held that "[w]here the removal was improper only for technical reasons, the issue on appeal 'is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.'" *Id.* at 22, quoting *Grubbs* v. *General Elec. Credit Corp.*, 405 U.S. 699 (1972).

The Second and Sixth Circuits have also long held that the presence of a defendant in the forum state does not preclude federal jurisdiction over a removed case. In *Woodward* v. *Overmyer Co.*, 428 F.2d 880 (2d Cir. 1970), the Second Circuit confronted a case that was removed from New York state court, where a defendant was a New York corporation. "While the action should therefore have been remanded if the plaintiffs had moved for such relief, no suggestion on this score was made until [defendants] brought the point to [the court's] attention." *Id.* at 882 Judge Henry Friendly, writing for the panel, reviewed the existing precedent, which at the time was uniform. *Id.* He cited the Sixth Circuit's decision in *Handley-Mack Co.* v. *Godchaux Sugar Co.*, 2 F.2d 435 (6th Cir. 1924). 428 F.2d at 882. In that case, the Sixth Circuit held that where there was complete diversity in a removed case but also a forum-state defendant, if there was "no timely request for remand, the situation could be considered to be as if the plaintiff had brought the action in the federal court," and "objection on the score of nonremovability would be deemed waived." *Id.*

Judge Friendly noted that Judge Learned Hand had followed the Sixth Circuit's *Handley-Mack* decision in *Bailey* v. *Texas Co.*, 47 F.2d 153, 155 (2d Cir. 1931). Judge Hand found the *Handley-Mack* decision to be

"conclusive." 428 F.2d at 882, quoting *Bailey*, 47 F.2d at 155. Given the precedent holding that a violation of the forum defendant rule was nonjurisdictional, the panel and Judge Friendly were "quite content to follow our distinguished predecessors." 428 F.2d at 882-83.

The Eleventh Circuit has indicated its agreement with the six circuits that have directly held that the forum defendant rule is nonjurisdictional. In *Snapper, Inc.* v. *Redan*, 171 F.3d 1249 (11th Cir. 1999), the court examined the history of § 1447 in the context of determining whether that section permitted review of a remand order based on a forum selection clause. In the course of its analysis, the court noted the circuit split over whether a violation of the forum defendant rule is a "defect other than lack of subject matter jurisdiction" under § 1447. *See id.* at 1257-58. The court noted that the 1996 revision of the statute "would seem to address neatly the issue that had concerned courts under the 1988 version, suggesting that a removal in violation of 1441(b) is subject to the 30-day time limit." *Id.* at 1258. Under the Eleventh Circuit's interpretation of the statutory language, a violation of the forum defendant rule would be a "defect other than lack of subject matter jurisdiction" under § 1447(c). *See id.*

B. The Eighth Circuit Stands Alone In Holding That A Violation The Forum Defendant Rule Defeats Federal Jurisdiction Over Cases Removed From State Court.

The Eighth Circuit is the only circuit to have adopted the contrary rule that the presence of any defendant in the forum state divests the district court of subject matter jurisdiction it would otherwise have over a case removed from state court. The court originally took this position in *Hurt* v. *Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992). *Hurt* was a personal injury case that was

removed from state court on the basis of federal question jurisdiction under the Federal Insecticide Fungicide and Rodenticide Act. *Id.* at 1143. Nearly a year after the notice of removal, the plaintiff moved to remand, asserting that removal based on a federal question was improper. *See id.* at 1143-44. The district court held that the removal was proper, and any nonjurisdictional objection to removal had been waived. *Id.* at 1144.

On appeal, the court first determined that the action was not removable on federal question grounds, and then considered whether "the fact that the District Court would have had diversity jurisdiction" cured the impropriety. *Id.* at 1145. The court noted that the case would not have been removable because one defendant was a citizen of the original forum state. *Id.* at 1145. The court held that the presence of a forum-state defendant creates "an absence of subject-matter jurisdiction" that "cannot be waived." *Id.* at 1146 n.1.

The *Hurt* court relied primarily on this Court's decision in *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699 (1972). In *Grubbs*, the United States had been interpleaded as a party to an existing case and had removed the action to federal court. 405 U.S. at 701. No party objected to federal jurisdiction. *Id.* After trial and judgment, the Fifth Circuit on its own initiative determined that there had never been federal jurisdiction and remanded the case to state court. *Id.* at 702. This Court reversed, holding that "where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* The Court determined that there had been diversity jurisdiction and remanded the

case to the court of appeals for consideration on the merits. *Id.* at 704, 706.

The Eighth Circuit in *Hurt* held that *Grubbs* "expressly relied on the fact that the plaintiff had never objected to removal in the district court." 963 F.2d at 1146. In *Hurt,* however, "the plaintiff did object to the removal in the District Court." *Id.* The court thus held that *Grubbs* did not apply and the district court lacked jurisdiction. *Id.*

In the instant case, the Eighth Circuit reaffirmed its holding in *Hurt.* The court acknowledged that there was contrary authority from other circuits, but concluded that "*Hurt* sets forth the better rule," and that "the violation of the forum defendant rule is a jurisdictional defect." App., *infra,* 4a. Given the opportunity to reconsider *Hurt* en banc, the Eighth Circuit declined. App., *infra,* 8a.

II. The Forum Defendant Rule Is Not A Requirement Of Federal Jurisdiction.

The judges who have concluded that the forum defendant rule is nonjurisdictional (including, among others, Learned Hand and Henry Friendly) have given persuasive reasons for doing so.

First, the text of § 1441 indicates that the forum defendant rule is not jurisdictional. The section begins by stating that a "civil action of which the district courts have original jurisdiction founded on [a federal question] shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b). It goes on to state that "[a]ny *other such action*" is subject to the forum defendant rule. *Id.* (emphasis added). The rule thus specifically applies only to "civil action[s] of which the district courts have original jurisdiction." *Id.* If the forum defendant rule were jurisdictional, the second sentence of § 1441(b) would lead to the anomaly that the

district court is required to have jurisdiction over a particular case as a prerequisite to stating that jurisdiction is lacking.

Second, this Court's decisions have "consistently refused to treat the removal statute as imposing independent jurisdictional requirements." *Korea Exch. Bank*, 66 F.3d at 49. The Court has recognized a distinction between the removal "process" and restrictions on subject matter jurisdiction in the federal courts. *Id.*, citing *Mackay* v. *Uinta Dev. Co.*, 229 U.S. 173, 176 (1913) (finding jurisdiction over case even though improperly removed).

Third, as Professor Moore explains, "[t]he policy behind the forum-defendant rule supports the nonjurisdictional characterization." 16 Moore's Federal Practice § 107.14[2][e][ii]. An original function of the federal court system is to provide a forum where out-of-state defendants could expect a hearing free of any local prejudice. The forum defendant rule is consistent with this policy and with the policy that the plaintiff chooses the forum. It allows an out-of-state plaintiff to choose a state forum when a federal forum is available. The plaintiff may preserve his choice by moving to remand if the defendant removes the case to federal court. If the plaintiff decides that he prefers the federal forum and does not object, holding that the forum defendant rule is jurisdictional would defeat that preference. The rule is designed to preserve the plaintiff's choice of forum; holding the rule to be jurisdictional preserves only a right that the plaintiff has chosen not to assert. *Id.*

The Eighth Circuit's contrary decision that the presence of an in-state defendant destroys subject-matter jurisdiction is unpersuasive. In *Hurt* the court simply asserted that this Court's decision in *Grubbs* was distinguishable because, unlike the plaintiff in *Grubbs*, the *Hurt* plaintiff had objected to removal. This is wrong

for two reasons: First, it is axiomatic that a party may not waive lack of subject matter jurisdiction. *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 18 (1951) ("It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.") The plaintiff's objection to removal is thus immaterial to the question of whether the court has subject matter jurisdiction, and *a fortiori* is immaterial to whether a particular condition of removal is or is not jurisdictional. Second, at the time of the events in *Hurt*, § 1447(c) provided (as it does now) a 30-day time limit for nonjurisdictional defects "in the removal process," but no time limit for lack of jurisdiction. *Snapper*, 171 F.3d at 1256 (quoting 1988 version). The *Hurt* plaintiff objected to removal more than a year after the notice of removal. 963 F.2d at 1143. To the extent her objection was for a nonjurisdictional defect it was untimely; to the extent it was jurisdictional, no objection was necessary. *Hurt* thus fails to articulate any persuasive reason that the forum defendant rule is jurisdictional.

III. The Eighth Circuit's Decision That The Forum Defendant Rule Is Jurisdictional Was Dispositive Of The Case.

The Eighth Circuit's holding that it lacked jurisdiction was dispositive of the case. Had the court held that the forum defendant rule is nonjurisdictional, it would have found that it had jurisdiction to hear the appeal, and would have been obliged to reverse the district court's remand order. Although the court suggested that there were additional grounds for remanding the case, those suggestions are plainly incorrect.

First, the court of appeals noted that Petitioner's notice of removal was deficient for violating the "rule of unanimity," which requires that all defendants join the

notice of removal. App., *infra*, 3a. The court stated that this defect "appears to be dispositive." *Id.* That is incorrect. The courts of appeal are in agreement that the "rule of unanimity" is a defect in the removal procedure, which must be raised by motion within 30 days of the notice of removal. *See, e.g., Payne* v. *Brake*, 439 F.3d 198, 203 (4th Cir. 2006) ("Failure of all defendants to join in the removal petition does not implicate the court's subject matter jurisdiction. Rather, it is merely an error in the removal process.") (also collecting cases); *Loftis* v. *UPS*, 342 F.3d 509, 516-17 (6th Cir. 2003) (breach of the rule of unanimity is a "technical defect[] in the removal procedure" that "must be raised by a party within thirty days of removal" or else be "waived"). Indeed, the Eighth Circuit itself has held that failure of all defendants to join in removal is "not jurisdictional," and "a party may waive the right to object to removal on these grounds." *Nolan* v. *Prime Tanning Co.*, 871 F.2d 76, 78 (8th Cir. 1989); *see also Hurt*, 963 F.2d at 1146 n.1 (failure of a defendant to join the removal petition "was procedural."). Respondent waived his right to a remand based on the rule of unanimity by failing to move for remand within 30 days.

Second, the court stated that "even if this case had been reviewed under the rule that the forum defendant rule is nonjurisdictional, [Petitioner] could not have prevailed." App., *infra*, at 5a n.3. The court reasoned that Respondent filed his brief in response to the district court's order within the 30-day window for filing a motion to remand, and that this "arguably obviated the need to file a motion to remand." *Id.* This is also incorrect.

Respondent's brief recited only the facts concerning service upon the in-state defendants; it did not request remand. Section 1447 is clear that a defect other than lack of subject matter jurisdiction must be raised by a "motion to remand the case." 28 U.S.C. § 1447(c). Accordingly, the courts of appeals agree that a district

court may not *sua sponte* remand a case based on a defect in the removal process. *E.g.*, *Loftis*, 342 F.3d at 516-17 ("[T]echnical defects in the removal procedure . . . may not be raised *sua sponte*."); *Velchez* v. *Carnival Corp.*, 331 F.3d 1207, 1209 (11th Cir. 2003); *In re Allstate Ins. Co.*, 8 F.3d 219, 223 (5th Cir. 1993) ("[W]e can discern no basis, in either the language of the amended statute or in policy, for conferring upon the district courts discretion *sua sponte* to remand for purely procedural defects."). These courts have recognized that a plaintiff has the "ability to acquiesce in a procedural problem," and that "[a]llowing district courts to remand cases on their own because of procedural defects" could "depriv[e] both sides of their preferred forum." *Velchez*, 331 F.3d at 1209. In this case, Respondent not only refrained from filing a motion to remand, but filed an answer affirmatively urging the federal court to "proceed to adjudication." Pl.'s Reply & Answer at 3.

IV. The Question Presented Will Not Benefit From Further Consideration In The Courts Of Appeals

This Court has recognized that "[t]he distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics." *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988). This Court frequently has granted review in cases presenting questions concerning the subject-matter jurisdiction of federal courts, in order to ensure that the scope of federal jurisdiction is uniform throughout the United States. *See* note 1 *supra* (collecting cases).

No fewer than eight circuits have opined on whether the presence of an in-state defendant is a jurisdictional defect in removal, or whether it is instead a waivable defect other than lack of subject matter jurisdiction. In the more than 80 years since the question

first arose, the courts have examined the plain text and legislative history of the relevant statute as it evolved, the policy behind the forum defendant rule, this Court's jurisprudence, and the scholarly commentary. One circuit—the Eighth—has chosen to depart from the line of cases holding that the forum defendant rule is not a separate requirement of federal jurisdiction. Having reaffirmed its decision in *Hurt* in the instant case and declined to hear the case en banc, the Eighth Circuit is unlikely to restore the uniformity of the federal law. Absent a decision from this Court, the circuit split on an issue of the subject-matter jurisdiction of federal courts is likely to persist.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2006

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-1199

Thomas A. Horton, *Plaintiff-Appellee*,

v.

Katherine A. Conklin; Norman S. Redhead; Stephen W. Templar; *Defendants*,

Steven T. Waugh; *Defendant-Appellant*,

Church of the Holy Cross Episcopal; National Epileptic Foundation; St. Philips Episcopal Church and Outreach; Alison Horton Waldrip; Caring Friends of Denver; Lee Graber; Sylvia Graber; Steven Asay, *Defendants*.

Appeal from the United States District Court for the Western District of Missouri.

October 13, 2005, Submitted
December 8, 2005, Filed

Before LOKEN, Chief Judge, LAY, and BENTON, Circuit Judges.

LAY, Circuit Judge.

Steven Waugh appeals the decision of the district court[1] remanding this case to state court for lack of federal subject matter jurisdiction and denying Waugh's motion to dismiss other defendants. We affirm.

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[1] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri

I.

Thomas Horton, a citizen of Maine, brought a petition to construe a trust in the circuit court of Grundy County, Missouri. Horton named twelve defendants. Three of the named defendants reside in Missouri and were served in Missouri. The other nine defendants reside in other states. The trust in question was created by a married couple, as co-trustees, to dispose of their assets upon their deaths. Horton and eleven of the twelve defendants are beneficiaries of the trust.[2] Horton brought a petition to construe the trust because the co-trustees had altered the trust a number of times, creating uncertainty regarding how the trust should be administered.

Horton brought his petition to construe the trust on September 24, 2004. Waugh, a citizen of Arizona, timely filed a Notice of Removal based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(i). He did not join any other defendants in his motion. On November 17, 2004, a federal district court judge issued an order expressing concern that the court "may not have jurisdiction to hear this case." The judge noted that three of the named defendants appeared to be citizens of Missouri and stated that if any defendants had been served in state court proceedings, removal would be improper due to lack of jurisdiction. The order directed Horton to file a brief "addressing whether any Missouri citizen defendants have been served in the underlying state cause of action."

On November 22, 2004, Horton filed a brief in reply to the district court's order stating that three of the defendants had been served in Missouri. Horton did not, however, file a motion to remand. On December 2, 2004, Waugh filed a reply brief in which he asserted that the

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[2] The twelfth defendant is named in the trust because he was a financial advisor to the trustees and has a copy of the trust.

other defendants were not required to join in removal because they had not responded to the complaint and were therefore nominal defendants. Waugh also filed a motion requesting that the federal district court dismiss all defendants that had not filed answers, arguing that these defendants were in default and should be dismissed.

The district court denied Waugh's motion to dismiss the other defendants and remanded the case to Missouri state courts due to a lack of complete diversity.

II.

We first note that Waugh's motion to remove was apparently defective from the outset due to his failure to join all defendants as required by our court's interpretation of 28 U.S.C. § 1446. *See Marano Enters. of Kansas* v. *Z-Teca Rests., L.P.*, 254 F.3d 753, 755 n.2 (8th Cir. 2001) ("Under the rule of unanimity, ordinarily all defendants must join in a notice of removal or the case will be remanded."). Although Waugh's failure to join the other defendants appears to be dispositive, we nonetheless consider the merits of his argument that, because Horton did not bring a motion to remand within thirty days of Waugh's motion to remove, he waived his right to have the case remanded to state court.

We must first determine whether our court has jurisdiction to review the district court's remand order. Under the so-called "forum defendant rule," a non-federal question case "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Congress has limited the power of appellate courts to review remands by district courts, stating that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d). In *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127-28, 116 S. Ct. 494, 133 L. Ed. 2d 461 (1995), the Supreme

Court clarified that "only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." Section 1447(c) provides in relevant part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Accordingly, our court lacks jurisdiction to review remand orders that are based on procedural defects brought within thirty days or jurisdictional defects raised at any time before final judgment is entered. *Things Remembered*, 516 U.S. at 127-28.

Waugh argues that the violation of the forum defendant rule constitutes a procedural defect. Thus, according to Waugh, because Horton did not bring a motion to remand within thirty days, he waived his right to have the case remanded to state court. We disagree.

Waugh's assertion that the violation of the forum defendant rule constitutes a procedural defect is contrary to this circuit's precedent. In *Hurt* v. *Dow Chemical Company*, 963 F.2d 1142, 1146 (8th Cir. 1992), we held that the violation of the forum defendant rule is a jurisdictional defect and "not a mere procedural irregularity capable of being waived." Waugh points out that other circuits have held to the contrary that the violation of the forum defendant rule is a procedural, nonjurisdictional defect, and urges us to abandon our reasoning in *Hurt*. *See, e.g.*, *Hurley* v. *Motor Coach Indus.*, 222 F.3d 377, 379 (7th Cir. 2000). We believe, however, that *Hurt* sets forth the better rule. Accordingly, we hold that Waugh's violation of the forum defendant rule constituted a jurisdictional defect. As such, because "an order remanding a case to the State court from which it

was removed is not reviewable on appeal," 28 U.S.C. § 1447(d), we lack jurisdiction to review the district court's order remanding the case at hand to state court.[3]

III.

We now turn to Waugh's argument that the district court erred in denying his motion to dismiss the other defendants in the case. According to Waugh, the defendants who failed to answer "should have been dismissed as nominal or dispensable parties," leaving Waugh as the only defendant and establishing complete diversity. As Waugh sees it, all of the other defendants are "nominal" because their "only interest in the suit was as named beneficiaries of the subject Trust."

Federal Rule of Civil Procedure 21 provides in relevant part that "parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action on such terms as are just." The United States Supreme Court has stated that "it is well-settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989). The Court has also stated that "the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy."

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[3] It should be noted that Waugh's argument that Horton waived his right to have the case remanded by failing to file a motion to remand within thirty days fails to acknowledge that Horton demonstrated, per the district court's order, that Missouri defendants had been served within the thirty day window Horton had to file a remand motion. Thus, even if this case had been reviewed under the rule that the forum defendant rule is nonjursidictional, Waugh could not have prevailed, as Horton's compliance with the district court's order arguably obviated the need to file a motion to remand.

Navarro Sav. Ass'n. v. *Lee*, 446 U.S. 458, 460, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980).

In the case at hand, Horton was designated as the successor trustee by a "letter of instruction" attached to the trust. Horton then brought an action to construe the trust because he was "unable to ascertain with a full degree of certainty, the nature and extent of the written trust documents to which should be relied upon in the further administration of the trust and eventual distribution thereof." Petition to Construe Trust P14. It appears that eleven of the twelve defendants in this case will be affected to varying degrees by the court's interpretation of the trust, as each was named as a beneficiary at one point in the trust's much-altered existence. Thus, on the face of the pleadings, none of the defendants are dispensable, as they all were at one time beneficiaries to the trust. Determining which beneficiaries, if any, are dispensable requires an evaluation of the case on the merits by the district court. Accordingly, the district court did not err in denying Waugh's motion to dismiss the other defendants in this case.

IV.

As a final matter, we address Horton's motion for sanctions against Waugh. Horton requests that this court impose sanctions for damages and costs against Waugh under Fed. R. App. P. 38, which governs frivolous appeals and provides in relevant part that "if a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee." Horton asserts that Waugh's motion for removal to state court and motion to dismiss were without merit because mandatory authority dictated the case could not be removed.

Our court has stated that an appeal is frivolous "when the result is obvious or when the appellant's

argument is wholly without merit." *Newhouse* v. *McCormick & Co., Inc.*, 130 F.3d 302, 305 (8th Cir. 1997) (citing *Indianapolis Colts* v. *Mayor of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985)). We have also observed that "sanctions are appropriate where an appeal challenges district court decisions that are unquestionably supported by the great weight of the evidence and wholly in conformance with applicable law." *First Commercial Trust Co.* v. *Colt's Mfg. Co., Inc.*, 77 F.3d 1081, 1084 (8th Cir. 1996) (citation and quotation omitted).

We first observe that Waugh's motion to remove was arguably defective from the outset due to his failure to join all defendants as required by our court's interpretation of 28 U.S.C. § 1446. Further, as noted earlier, Waugh's argument that Horton waived his right to have the case remanded by failing to file a remand motion ignores the fact that Horton demonstrated that Missouri defendants had been served within the thirty day window to file a remand motion in accordance with the district court's order, which arguably obviated Horton's need to file said motion.

Overlooking these defects, Waugh's appeal rested on the premise that our court might overturn *Hurt* in light of contrary views expressed by other circuits. Although there are grounds for us to conclude that Waugh's appeal challenged a district court decision that was "wholly in conformance with applicable law," given the disagreements among the circuits regarding the nature of the forum defendant rule violations, we decline to impose sanctions under Fed. R. App. P. 38.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Thomas A. Horton, *Appellee*,

vs.

Steven T. Waugh, *Appellant*

No. 05-1199

February 9, 2006, Decided

Order Denying Petition for Rehearing and for Rehearing *En Banc*

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Thomas A. Horton, *Plaintiff*

v.

Katherine A. Conklin; Norman S. Redhead; Stephen W. Templar; Steven T. Waugh; *Defendant-Appellant,* Church of the Holy Cross Episcopal; National Epileptic Foundation; St. Philips Episcopal Church and Outreach; Alison Horton Waldrip; Caring Friends of Denver; Lee Graber; Sylvia Graber; Steven Asay, *Defendants.*

Case No. 04-1002-CV-SJ-FJG

ORDER

Before the Court is defendant Steven T. Waugh's Notice of Removal (Doc. No. 1). Defendant Waugh premises his notice of removal on diversity of citizenship, pursuant to 28 U.S.C. §§ 1332(a) and 1332(d). Also pending before the Court is defendant Waugh's Motion to Dismiss (Doc. No. 10).

The pending case was removed to federal court on November 3, 2004. On November 17, 2004, after reviewing the petition for removal, the Court issued an Order (Doc. No. 6) requiring plaintiff and defendant to file briefs regarding the propriety of jurisdiction of this matter in federal court. In particular, the Court was concerned because in cases (such as the present one) where diversity of citizenship is the only basis for removal, removal is precluded if any defendant is a citizen of the state in which the action is filed. See 28 U.S.C. §1441(b). Three of the named defendants in plaintiff's petition (St. Philips Episcopal Church, Lee Graber, and Sylvia Graber) are citizens of the state of

Missouri. If these defendants have been served in the state court proceedings, removal would be improper and this Court would not have jurisdiction. *See Hurt* v. *Dow Chem. Co.*, 963 F.2d 1142, 1144-1145 (8th Cir. 1992) (noting that, under Eighth Circuit law, the ban on local defendants is a jurisdictional defect that may be raised at any time, as opposed to a procedural defect that must be raised by plaintiff within 30 days of the notice of removal).

On November 24, 2004, plaintiff responded to the Court's Order, informing the Court that all parties, including the Missouri defendants, had been served by certified mail. Plaintiff included certified copies of the return receipts demonstrating service. Therefore, it appears that Missouri citizens were served as defendants in state court proceedings, and removal jurisdiction in this Court would be improper.

On December 2, 2004, defendant Waugh filed a response to plaintiff's brief, arguing that the remaining defendants were not required to join in the removal because (1) they are merely nominal or formal parties, and (2) they did not respond to the complaint in any way. Regarding defendant's assertion that the remaining parties are merely nominal or formal, defendant Waugh provides no factual support or analysis for this assertion. Instead, defendant cites to three cases, all from outside this Circuit and over thirty years old, without providing any analysis as to why these cases apply to the facts at hand. The Court cannot accept conclusory allegations in making a determination on the propriety of federal jurisdiction. *See Monteil* v. *Thrift Drug, Inc. d/b/a Eckerd Drug*, 03-0558-CV-W-DW (Slip Opinion, August 27, 2003, p.2); *Wilson* v. *Target Corporation*, 04-0009-CV-W-HFS (Slip Opinion, September 30, 2004, p.4).

Defendant, in a related argument, also asserts that because the remaining defendants did not respond to the complaint, they should be considered nominal or formal

parties. Defendant asserts that all of the served defendants were served on or before October 1, 2004. Defendants asserts (without providing support, other than informing the Court that a Web site maintained by the State of Missouri contains this information) that none of the remaining served defendants filed a response to the petition as of November 2, 2004, when defendant Waugh filed his notice of removal. Because Missouri law requires an answer to be filed within 30 days of service, defendant argues that the remaining served defendants had all defaulted as of November 1, 2004, and were no longer properly considered to be defendants at that time. Defendant Waugh concurrently filed a motion to dismiss the defendants who failed to respond to the complaint (see Doc. No. 10).

There are numerous difficulties with defendant's argument. First, defendant has provided no evidence that supports his contention that answers have not been filed to plaintiff's complaint. Second, defendant does not represent that default judgment has been entered against the remaining defendants by the state court. This Court cannot enter a default judgment against Missouri parties in this case because the Court does not have removal jurisdiction over cases where Missouri parties remain as defendants.[1] As for defendant Waugh's motion to dismiss the defendants who failed to respond to the complaint, such motion is meritless. Plaintiff is the party in this circumstance who would have a right to request voluntary dismissal of parties who failed to respond to a complaint, not defendant Waugh.

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[1] Furthermore, even if default were entered against the remaining parties, defendant Waugh would still likely need to move to sever his claims from the defaulting defendants before he would have a right to remove his case.

The party invoking the jurisdiction of a federal court bears the burden of proof in establishing that such jurisdiction is proper. *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); Kopp v. Kopp, 280 F.3d 883 (8th Cir. 2002). Federal courts are courts of limited jurisdiction, and a civil action brought in a state court may be removed by a defendant only if the federal court has original jurisdiction. 28 U.S.C. § 1441. Defendant has failed to meet his burden to prove that jurisdiction is proper in this Court; therefore, this matter will be remanded to the Circuit Court of Grundy County, Missouri.

Accordingly, for the above stated reasons, it is ORDERED that:

1) defendant Waugh's motion to dismiss (Doc. No. 10) is DENIED; and

2) this case is REMANDED to the Circuit Court of Grundy County, Missouri.

IT IS SO ORDERED.

/s/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: December 10, 2004
Kansas City, Missouri